

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

27409

**FILE:** B-211936**DATE:** February 14, 1984**MATTER OF:** Talley Educational Services, Inc.**DIGEST:**

1. In a negotiated procurement, an agency may make cost versus technical tradeoffs, subject to the tests of rationality and consistency with the established evaluation factors. Where a solicitation states that "Price Advantage" is worth no more than 10 of 100 evaluation points, the agency reasonably may determine that the advantages of a proposal rated 20 percent higher technically than another outweigh the other's 8.9 percent cost advantage.
2. GAO has no authority under the Freedom of Information Act to determine when or what information must be disclosed by government agencies.
3. A protester's complaints concerning the conduct of negotiations are untimely when first raised 6 months later.

Talley Educational Services, Inc. (now Intelcom Educational Services, Inc.) protests the award to RCA Service Company of a cost-reimbursement type contract for operation of the Inland Empire Job Corps Center in San Bernardino, California, from June 1, 1983 to May 31, 1985. The Employment and Training Administration, Department of Labor, awarded the contract to RCA under request for proposals (RFP) No. JC-IX-83-10. The protester contends the agency should have awarded the contract to it because it offered the services at a lower cost to the government than did RCA. The protester also complains about the conduct of the negotiations. We deny the protest in part and dismiss the remainder.

The solicitation requested proposals for all personnel, services, and materials needed to operate a Job Corps center. The contractor will be required to provide educational and vocational training, health care, counseling, and a broad range of other services. The solicitation stated that a panel of agency specialists would evaluate each proposal, assigning a numerical score for specified evaluation factors up to a stated maximum. On a 100-point scale, "Price Advantage" was assigned a maximum weight of 10 points.

Following initial evaluation of the two proposals received--Talley's and RCA's--agency personnel met with both offerors for discussions. The agency identified areas of concern in each proposal and requested the submission of best and final offers. When the agency rescored the best and final offers, RCA's technical proposal received an average score from the evaluators of 84.80 out of a possible 90 points; its technical score was more than 20 percent higher than the protester's average score of 70.28. The evaluated cost of RCA's proposal was \$521,707, 8.9 percent higher than the protester's. The agency determined that RCA's proposal was technically superior to Talley's and awarded the contract to RCA at an estimated total cost of \$6,377,188.

The protester's basic complaint is that it should have received the award because its proposal was evaluated at a substantially lower cost than RCA's. It also questions the agency's determination that the two proposals were not substantially equal technically, contending that such determination was arbitrary and capricious. In addition, the protester complains about the conduct of negotiations, saying that the agency held a meeting at which it recited 337 questions, but did not provide the protester a copy of the questions, did not allow immediate responses, and did not allow the protester to use recording equipment. Finally, the protester complains that it was unfairly hampered in presenting its protest because the agency failed to make available to it copies of the evaluators' rating sheets and other documents generated during the procurement. The protester contends the

agency violated the Freedom of Information Act, 5 U.S.C. § 552 (1982), by withholding such documents on the basis of their being "classified/privileged."

There is no requirement that an agency award a cost-type contract on the basis of the lowest proposed costs. Mitek Systems, Inc. - Request for Reconsideration, B-208786.3, May 10, 1983, 83-1 CPD 494. Rather, as in any negotiated procurement, award of a contract need not be made to the offeror proposing the lowest cost unless required by the solicitation. See A.B. Dick Company, B-207194.2, November 29, 1982, 82-2 CPD 478. Procurement officials have broad discretion in determining the manner and extent to which they will make use of technical and cost evaluation results. Columbia Research Corporation, 61 Comp. Gen. 194 (1982), 82-1 CPD 8. An agency may make cost versus technical tradeoffs, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 25. The determining element is the considered judgment of the procurement officials concerning the significance of the difference in technical merit among the offerors. Columbia Research Corporation, supra. This Office will question that judgment only upon a clear showing of unreasonableness. American Coalition of Citizens with Disabilities, Inc., B-205191, April 6, 1982, 82-1 CPD 318.

In this case, the solicitation did not indicate that award would be made based on the lowest evaluated cost; instead, the solicitation stated that award would be made to the offeror whose offer would be most advantageous to the government, price and other factors considered. The solicitation stated further that the technical proposal would be "the most important factor in the award of the contract", and set forth an evaluation scheme under which "Price Advantage" was assigned only 10 percent of the evaluation points. In addition, the solicitation stated that selection of the contractor would be in accordance with Department of Labor Procurement Regulations § 29-3.805-50 which provides, in part, that for award of cost-reimbursement contracts, the estimated costs and

proposed fees shall not be the controlling factors where offers are not substantially equal technically.

It is thus clear from the terms of the solicitation that the protester was not entitled to an award simply by having submitted the lowest cost, technically acceptable proposal. Rather, the protester's lower evaluated cost was only a factor for the source selection official to consider in determining which proposal would be most advantageous to the government. In selecting RCA for award, the agency determined that RCA's technical proposal was superior to the protester's and that RCA's technical advantage outweighed the protester's apparent cost advantage.<sup>1</sup> Although the protester alleges that the agency was arbitrary and capricious in making these determinations, for the reasons that follow, we do not agree.

In responding to this protest, the agency provided this Office with a list of concerns regarding each offeror's initial proposal, worksheets of the evaluation panel members, a summary scoring sheet, and an intra-agency memorandum which discussed the evaluation results and recommended award to RCA. The agency provided none of this material to the protester. We recognize that without some of this material, the protester was at a disadvantage in attempting to substantiate its allegation that the agency acted arbitrarily and capriciously in selecting RCA for award. While we fail to understand why the agency could not have provided at least a summary of this material

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<sup>1</sup> The record indicates that the agency questioned the realism of several of the protester's projected costs and that the \$521,707 difference between the two proposals would have narrowed considerably had the agency adjusted the protester's projected costs to more realistic levels. Although the protester contends that no such adjustments to its costs were necessary, we need not resolve this issue since the agency selected RCA for award despite the protester's apparent \$521,707 cost advantage and undoubtedly would have made the same selection were the protester's cost advantage reduced or eliminated.

to the protester, this Office has no authority under the Freedom of Information Act to determine what documents an agency should release to a protester. Ikard Manufacturing Company, B-211041, March 23, 1983, 83-1 CPD 302. When an agency declines to make relevant documents available to a protester, we will obtain and review such documents in arriving at our decision. Support Systems Associates, Inc., B-200332, February 9, 1982, 82-1 CPD 112; see generally Systems Research Laboratories, Inc.--Reconsideration, B-186842, May 5, 1978, 78-1 CPD 341. We did so here. From our review of the record, it appears that the selection of RCA for award was consistent with the terms of the solicitation and was otherwise unobjectionable.

The comments on the evaluators' worksheets indicate that, although technically acceptable, the protester's initial proposal was weak in a number of areas. The protester's best and final technical proposal addressed some, but not all, of these concerns. For example, the evaluators commented that Talley's best and final proposal was vague in some areas, that it did not address issues unique to the Inland Empire Job Corps Center, that it was too ambitious and, therefore, unrealistic, and that it did not explain how the protester would accomplish some of its stated objectives. From our review of the protester's proposal, it does not appear that the agency's evaluation in this respect was arbitrary or capricious. As indicated, the protester's best and final proposal received an average technical score of 70.28 compared to RCA's average score of 84.80. We believe it was reasonable for the agency to conclude that the 20 percent technical superiority of RCA's proposal outweighed the protester's ostensible 8.9 percent cost advantage, particularly since the solicitation indicated that technical factors were nine times as important as price. See Joint Action in Community Services, Inc., B-209359, May 16, 1983, 83-1 CPD 510. We deny this aspect of the protest.

In its response to the agency report, the protester complained for the first time about the conduct of the negotiations. Since the record indicates that the agency conducted negotiations on March 3 and 9, 1983, but the protester's objections concerning the conduct of those negotiations were not raised until it filed its comments on the report in September, the objections are untimely

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under our Bid Protest Procedures and will not be considered. 4 C.F.R. § 21.2(b)(2) (1983). See PSI Associates, Inc., B-200839, May 19, 1981, 81-1 CPD 382.

We deny the protest in part and dismiss it in part.

*for*   
Comptroller General  
of the United States